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In the Supreme Court of the United States

October Term, 1980

JOSEPH FRANCIS MERLO, RAYMOND PARKS, HARRY BLACKFORD,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE FACTS

An audit by the accountant with the Attorney General's Charitable Foundation Section revealed that bingo games conducted at Mahoning Plaza, Canton, Ohio, and at Lakemore Plaza, Summit County, Ohio had amounts of money remaining after the distribution of substantial prizes. The amounts of money left over from the games monitored by the accountant ranged from $2,148.00 to $7,-400.00 per night (Miller Transcript, Volume 1 pages 48-55). According to the accountant, 80 session average after prizes for Summit County was $1,509.00, and the 124 session average for Mahoning County was $1,700.00.

Following the audit, a pattern of surveillance of the bingo games was conducted by the Summit County Sheriff's Office. This surveillance is set out in Petitioners' brief and will not be duplicated in full. However, certain additions are necessary.

On Sunday, April 30, Officer Padrutt was assigned to the surveillance of the Merlo residence at 1342 Weathervane Lane. On this date, Petitioner Joe Merlo was observed leaving his residence around the same time that Harry Blackford was observed exiting the back of the apartment building. Petitioner Joe Merlo was later observed arriving back at the apartment with Ray Parks. Merlo carried a green bag from his car into the apartment. This was the same type of green bag that Ray Parks was seen carrying from Boardwalk Bingo in Lakemore Plaza (Transcript of Miller, Volume II, pages 410-411). Several canvas bags of different colors, including two green bags were seized from Sandra Brunton's apartment and car. All of the bags contained cash and bingo receipts (Miller Transcript, Volume III, page 37).

Surveillance disclosed that the canvas bags were transported by Sandra Brunton from her home at 2345 Iota Avenue to 338 East Portage Trail, Cuyahoga Falls, Ohio (Miller Transcript, Volume III, pages 30-32). Detective Bryant testified that she was admitted into the apartment by an unidentified male through the garage. Upon execution of the search warrant for that apartment, it was found to be vacant except for canvas (bank) bags, bingo records and a written lease for the property in the name of Harry Blackford.

Paula Brailer, of Akron, testified that she was a former employee of City Novelty and that she had worked at Mahoning Plaza in Canton. She testified that she worked as a checker in bingo games. Ms. Brailer stated that

she had worked in other bingo games before. Brailer testified that Harry Blackford was her boss and that she had been paid by check every two weeks (Miller Transcript, Volume II, pages 305, 306, 308). She stated that she knew Joe Merlo but that she had never seen him in Canton. Brailer testified that she had attended a meeting in September 1977 regarding the hiring of personnel for the Lakemore Plaza Bingo Game. Joe Merlo, Harry Blackford and someone named "Ray" were present during the meeting (Transcript of Miller, Volume II, page 312).

Laurie Leggitt testified that she was employed as head cashier for Lakemore Bingo by Ray Parks in September 1977 (Miller Transcript, Volume II, page 319). Leggitt testified that after receiving the money from the checkers each evening she would count it, wrap it in money bands and tally the amounts on a summary sheet. The money was then placed in a canvas bag and left in the office (Transcript of Miller, Volume II, page 321). State's Exhibits 12, a red suitcase seized from the Merlo residence, contained several packets of bingo records for Lakemore and Mahoning Plaza Bingo. Leggitt identified State's Exhibit 1 of the packets, as containing the head checker sheets and callers sheets that she collected when she tallied the money. Leggitt recognized the second sheet from the top as being the one she had filled out each evening. She did not recognize the top sheet attached to each packet (Transcript of Miller, Volume II, pages 328, 329, 332).

State's Exhibit 9, in part was a banded packet of money which contained Laurie Leggitt's fingerprint on the band (Transcript of Miller, Volume III, pages 6-7). This packet of money was delivered to Attorney Roetzel on April 4 (Miller Transcript, Volume II, page 354; Volume III, pages 4-7).

The red suitcase, State's Exhibit 12, found in the Merlo apartment contained packets of bingo records for the Akron and Canton bingo halls. The packets contained the head checker sheet, caller sheets and tally sheets, which the evidence shows were collected and prepared by the head checker each evening. The top sheet attached to each packet was in Sandra Brunton's handwriting (Transcript, page 72). State's Exhibit 72, a small red binder notebook, was seized from Sandra Brunton's apartment. The writing in the notebook was Brunton's (Transcript, page 71). The notebook is divided into two sections, separated by a number of blank pages. The back side of the third page in the first section of pages lists a series of three columns of figures. The following is an illustration:

2484.40	13	26800
3735.54	14	1900
5876.05	15	M 10000 515000
		M HP 1100 49995
4684.20	16	16921

The figures to the left of the middle column represent the same "total amounts" tallied on the top summary sheets prepared by Sandra Brunton attached to the bingo packets from the Canton bingo hall on the dates of April 13, 14, 15 and 16.

The back side of the second page of the second section of the notebook also lists a series of columns as illustrated below:

1038.99	18	6500
3917.00	19	1700
3101.45	20	——
5613.41	21	12000

The figures to the left of the middle column are identical to the figures under the "total amounts" column on the

top summary sheets attached to the bingo packets from the Lakemore bingo hall on May 18, 19, 20 and 21, which were prepared by Brunton.

On some of the cover summary sheets attached to the bingo packets from the Canton and Akron bingo halls indicated that the expenses, i.e., payroll, concessions, church payments, etc., when they were made, were taken out of the cash received from the "cards" before the total amounts received from each of the games were added up.

The figures listed in the red notebook, as illustrated above, represented the amount remaining after some of the expenses were already paid. The column to the right of the middle or "date" column in the notebook indicates that payments were made from the remainder of the proceeds as listed on the left side of the page. References are made to "bills", "rent", J. UJ, Harry, P, M, S, Att, Attorney, R P, and Ray's pay along with numerous others.

The evidence also shows that Nancy Merlo kept records of some of the bingo games' activities (Transcript, pages 70-71).

Joan DiLaura, Susan Taylor, Lollie Patsy, Pam Callaghan and Janice Badini all were given money which had been photocopied by Detective Maurer of the Summit County Sheriff's Department. These people played bingo during the week following June 8, 1978. They used the "marked" (photocopied) money to purchase bingo cards.

Some of the "marked" money was later recovered from the searches conducted at various locations. Detective Bryant coordinated and summarized the collection of the bags and containers of money (State's Exhibit 70, 73, 74, 75, 94 and 99) (Miller Transcript, Volume III, pages 36-41). He summarized these exhibits on State's

Exhibit 102. The money contained in State's Exhibit 70 alone was in excess of $128,000.00 (Miller Transcript, Volume III, page 39).

Finally, Detective Bryant testified that he matched the previously photocopied bills (State's Exhibits 14-25) as described above, with currency found in State's Exhibits 70, 73, 74, 75, 94 and 99 (Miller Transcript, Volume III, pages 39-40). State's Exhibit 102, in summary form, reveals cash received at both bingo locations spread among nearly every person named in this indictment.

There can be no doubt that these two bingo games were the source of revenue for the named defendants. They were "skimming the cream", and retaining for themselves, that which they received in the name of charity.

RESPONDENT'S FIRST REASON FOR DENYING THE WRIT

AN EVIDENTIARY HEARING IS NOT REQUIRED WHERE AFFIDAVITS SUPPORT PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT.

The United States Supreme Court recently ruled in *Franks v. Delaware*, 438 U.S. 154 (1978), that a defendant could attack a search warrant only in a very limited instance. The court held that:

> To mandate an evidentiary hearing, the challenger's attack must be supported by more than a mere desire to cross-examine. *There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.* They should point out specifically the portion of the warrant affidavit that is claimed

> to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity of reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. (Footnote citation omitted) (Emphasis supplied).

The State submits that the Petitioners have first failed to comply with the procedural requirements of *Franks v. Delaware, supra.* The Petitioners have failed to make a substantial preliminary showing that in fact there was any false statement or reckless disregard for the truth contained in the affidavit. *Franks v. Delaware, supra,* clearly establishes that minor discrepancies do not affect the validity of a warrant. Further, the statement must be more than a negligent or innocent mistake.

United States v. Moore, 522 F.2d 1068, 1073 further explains *Franks v. Delaware, supra,* as follows:

> Lee Moore next contends that there was ample other evidence of substantial misrepresentations in the Reginato affidavit to support his demand for an evidentiary hearing on the facts therein presented. Moore points out here, as he did in the trial court, that paragraph one of the affidavit states that the informer had

provided reliable information to the FBI on five occasions in the past, while paragraph nine recites that the informer had provided reliable information on only *two* past occasions. Additionally, Lee Moore argues that certain language in the affidavit could lead a careful reader to the conclusion that a vehicle described in certain of the factual allegations in the affidavit was not the same vehicle for which a search warrant was sought. In our view, the language of the affidavit approaches the "substantial showing of falsehood" that is required. *United States v. Harris,* 501 F.2d 1, 5-6 (9th Cir. 1974).

If the Court examines the affidavits of Mr. Palda, it will find that Mr. Palda only alleges discrepancies in Detective Maurer's affidavit for the search warrants. The discrepancies center around the fact that different bags were used to transport the money and attendance and receipts figures for the bingo games.

While the State does not concede that there are *any* mistakes, there is certainly no showing that the alleged mistakes were false or intentionally reckless. Nor do the alleged mistakes taken collectively reach the level, to require a hearing under *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421 (1978).

Finally, the State admits that assuming the alleged false statements are deleted, there is still a showing of probable cause to support the affidavit. Specifically, the false statement is, "that the same canvas bag was seen being taken from the bingo hall to different houses of the Petitioners". As corrected, the affidavit would still assert that there was a regular exchange of bags, although not described, which were transported from the bingo hall to the various houses and eventually to the Executive Townhouse. Based on this information, the State main-

tains that there would still be a showing of probable cause to support the affidavit. Mr. Palda's supplementary affidavit does not support facts sufficient to grant an evidentiary hearing under the *Franks, supra,* test. Mr. Palda asserts in his affidavit that there were no discrepancies in the reported attendance figures submitted by the Petitioners by the Attorney General. The State submits that an examination of both sets of figures will show definite discrepancies.

The attendance figures listed in the audit were invariably higher than those reported by the Petitioners to the Attorney General's Office. Assuming *arguendo* that the attendance figures were consistent, there is still a strong showing of probable cause since there is a large discrepancy in attendance figures estimated by the Sheriff's Department and those submitted by the Petitioners to the Attorney General in the affidavit.

RESPONDENT'S SECOND REASON FOR DENYING THE WRIT

A PLEA OF NO CONTEST PURSUANT TO A STIPULATION OF FACTS WAIVES THE RIGHT, AFTER ENTRY OF THE PLEA, TO CHALLENGE NO CONTEST PLEA.

Ohio Criminal Rule 11(B) provides that a "plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged . . ." It is inconsistent for the Petitioners to challenge the State's evidence on appeal after admitting the truth of that evidence at his plea. Ohio Criminal Rule 12(H) limits an appeal upon a "no contest" plea to pretrial motions. *Compare* Criminal Rule 29(A).

Should Petitioners be permitted to challenge the weight and sufficiency of evidence, the State submits that the evidence is sufficient to support the trial court's finding of guilt. Petitioner Joseph Merlo pled "no contest" to all four counts of the indictment. The court found him guilty of Engaging in Organized Crime [Revised Code 2923.04(A)(5)]; Conducting an Illegal Bingo Game [Revised Code 2915.09(A)(2)]; Grand Theft [Revised Code 2913.02(A)(2)(A)(3)]; and Gambling [Revised Code 2915.02(A)(2)] (Transcript, Volume V, page 83). Although circumstantial evidence was relied upon to prove the elements of the crimes, the State submits that the evidence was of such a conclusive and persuasive nature that there was no reasonable hypotheses of innocence.

It is settled that where circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be inconsistent with the theory of innocence. *State v. Kuling,* 37 Ohio St. 2d 157, 169 (1974); *State v. Graven,* 54 Ohio St. 2d 114, 119 (1978). It is an accepted proposition that ". . . a fact may be proven to a moral certainty by circumstantial evidence as well as direct evidence." *State v. Graven, supra. State v. Nevius,* 147 Ohio St. 263 (1947).

The State presented evidence that bingo games were being conducted illegally in Canton (Boardwalk) and Akron (Lakemore Bingo) locations, and that the games were being operated to profit the individuals indicted in this case. The State submits that there was sufficient evidence of Merlo's involvement in the scheme to support the verdict. *State v. Eley* (1978), 56 Ohio St. 2d 169.

Evidence was presented that all of the Petitioners in this case, were involved in operating the bingo halls and skimming money from the gross receipts for their own profit.

Paula Brailer testified that she saw Joe Merlo at a bingo personnel meeting in September 1977, at the Lakemore Plaza in Akron. She stated that individuals named Harry Blackford and Ray were there also. Brailer remembered Joe Merlo from prior bingo meetings (Transcript, Volume II, page 133). The evidence presented indicated that Harry Blackford and Ray Parks were instrumental in helping the churches obtain bingo licenses. Each owned and managed companies which provided the games with the necessary supplies. Each Petitioner operated a bingo hall. The evidence derived from the surveillance and the search and seizures conducted by the Sheriff's Department was persuasive enough to support an inference that Joseph Merlo, his wife Nancy, and Cecilia Parks aided Blackford and Parks in the transportation of the money from the bingo halls and that the money was improperly and purposely withheld from the churches in violation of Ohio Revised Code 2915.09(A)(2). Members of the Summit County Sheriff's Office observed all of the Petitioners on occasion carried "full" canvas bags into the Merlo residence. Petitioner Merlo was observed by Officer Padrutt carrying a green canvas bag from his car into his apartment on April 30, 1978 (Transcript, Volume II, pages 410, 411). Several canvas bags, two of which were green, were seized from the house and car of Sandra Brunton (Merlo's sister), on June 11, 1978. All of the bags contained cash and bingo receipts (Transcript, Volume II, page 37). A suitcase containing $128,000.00 was also recovered from the apartment (Transcript, page 35). Some marked bills which had been previously spent at the bingo halls in Akron and Canton by prosecutor personnel were discovered in the suitcase (Transcript, page 39). State Exhibit 72, a small red notebook, was also seized from Brunton's residence and was stipulated to be in her handwriting.

The State asserts that the records seized from the Merlo and Brunton apartments, in addition to the audit by the Attorney General's Office, indicates that the operators of the bingo games were falsifying the reported income from the games and were depriving the churches of the proceeds.

The circumstantial evidence was of such a persuasive and convincing nature that there was no reasonable inference to draw from the circumstances except guilt.

RESPONDENT'S THIRD REASON FOR DENYING THE WRIT

EVIDENCE IS NOT REQUIRED TO BE SUPPRESSED PURSUANT TO A PROPERLY EXECUTED SEARCH WARRANT UNDER THE FOURTH AMENDMENT.

A. Suppression Was Not Required Because the Warrants Were Issued Without Probable Cause.

The Petitioners contend that the affidavit upon which the search warrants were issued contained only conclusory statements rather than facts, and was insufficient basis to justify a finding of probable cause in the issuance of the warrants.

Respondent maintains that the six page affidavit contained sufficient facts and circumstances to warrant a reasonable belief that probable cause existed.

In an effort to foster a proper judicial climate that encourages the use of warrants, as opposed to warrantless searches, decisions have been liberal in upholding the actions of officers who have proceeded by warrant. *Aguilar*

v. Texas, 378 U.S. 108 (1964). There is, therefore, a presumption of regularity and validity with respect to an affidavit supporting a search warrant. *Franks v. Delaware,* 438 U.S. 154 (1978).

Because the term "probable cause" means less than evidence which will justify conviction and may rest on evidence not legally competent in a criminal trial, the affidavit upon which probable cause is found and the warrant is issued, may be based on hearsay and need not reflect direct personal observations of the affidavit so long as the magistrate determining "probable cause" is informed of some of the underlying circumstances supporting the affidavit's conclusions. *United States v. Ventresca,* 380 U.S. 102 (1965).

Affidavits for search warrants are governed by less stringent rules than those dealing with admissibility of evidence in criminal trials. *State v. Karr,* 44 Ohio St. 2d 163, 339 N.E.2d 641 (1975). The affidavit need not make out a prima facie case against the Petitioners nor is it necessary that the magistrate be convinced beyond a reasonable doubt. *State v. Dodson,* 43 Ohio App. 2d 31, 332 N.E.2d 371 (1974). In evaluating the facts and circumstances presented in the affidavit, the magistrate deals only with probabilities rather than certainties. *United States v. Swihart,* 554 F.2d 264 (6th Cir. 1977).

In the present case, the search warrant affidavit provided the magistrate with many circumstances and facts to support a finding of "probable cause". The affidavit for the search warrant lists seventeen separate locations or automobiles to be searched. The individual designations of the places to be searched are listed with particularity. The knowledge portion of the affidavit is three pages in length containing ten paragraphs. The information sub-

mitted by the affidavit establishes bingo games being operated at two locations.

The affidavit further denoted that data obtained from the Ohio Attorney General's Office indicates that the average daily gross receipts reported by Lakemore Plaza Bingo was $4,174.00 with attendance of 300-400 people. Formal audits by the Attorney General's Office showed gross receipts of $8,387.30 on March 23, 1978, and $6,833.00 on March 24, 1978, representing a difference of $4,213.30 and $1,659.00 between the formal audit figures and the average daily reported figures. To further support the existence of discrepancies between the figures reported to the Attorney General's Office and the gross receipts and attendance, the affiant, personally, and other police officers, on more than twenty occasions observed the crowd at the bingo halls and estimated them to be composed of 400 to 650 people, a difference of 100-250 between the reported number and the police estimates. By using the police crowd estimate and figures provided by the Attorney General's Office, the affidavit figured that the average gross receipts should be more than $6,000 to $9,000 per night, figures far exceeding the reported average of $4,174.00.

The affiant provided the above evidentiary facts to demonstrate the ultimate fact—the discrepancy between the figures reported to the Attorney General by the Petitioners and the actual figures. Contrary to the Petitioners' claim of lack of factual material in the affidavit, the affiant may have provided much more factual data than necessary. The magistrate need not be given all the evidentiary facts that leads the affiant to the ultimate fact. Ultimate facts here, the discrepancy, may properly provide the basis for the magistrate's independent judgment. *State v. Eichhorn*, 47 Ohio App. 2d 227, 353 N.E.2d 861 (1975).

Although the above discrepancies alone may have been sufficient to establish probable cause that a crime was being committed, the test is not whether any one bit of information by itself provides the basis for finding probable cause but whether the sum total so does. *State v. Eichhorn, supra.* The affiant therefore offered further facts relevant to exorbitant charges to the charities for bingo supplies and the relatively small sums paid to the holders of the licenses for the operation of the bingo halls. He also offered facts relative to the transportation of books, records and money based on personal observation and the observation of other police officers during several days of surveillance of the bingo halls and the residence of the suspects.

The affiant is not subject to question merely because other officers were involved in the surveillance and crowd estimates. Observations by fellow officers engaged in a common investigation, as here, are plainly a reliable basis for a warrant applied for by one of their number. *United States v. Ventresca, supra.*

All of these facts and circumstances denoted in the affidavit when considered together are sufficient to warrant a man of reasonable caution in the belief that a crime was being committed. An independent magistrate, using his independent judgment based on the facts in his possession, is permitted to draw reasonable inferences from which probable cause can be concluded. *State v. Eichhorn, supra.*

The State submits that the court must review the affidavit in a common sense fashion. The affidavit should not be reviewed in hypertechnical fashion. *State v. Karr, supra, United States v. Ventresca, supra.* The Petitioners cite to this Court the case of *State v. Graddy* (1978), 55 Ohio St. 2d 132. The *Graddy* case can be distinguished on

two grounds. *First*, the *Graddy* case dealt with the reliability of an informant. In this case, there is no informant involved. The affidavit is based on the affiant's personal observations and reports which he has reviewed. The second basis on which *Graddy* can be distinguished is that the court concluded that the informant gave insufficient information to determine whether he was reliable. The court further indicated in *Graddy* that under that particular affidavit, the problem was not with "sufficiency of detail of the underlying circumstances disclosed but a complete omission of *any* of the circumstances" from which probable cause may be concluded.

Great deference even in doubtful cases must be given by courts to the determination of probable cause by the magistrate, and that determination should not be set aside unless arbitrarily exercised. *United States v. Swihart, supra.* In the present case, there was clearly no arbitrariness in the magistrate's finding of probable cause because the finding was more than adequately supported by the total facts and circumstances related in the affidavit by Detective Maurer. Therefore, the finding of probable cause was proper, the search warrant was valid, and the evidence obtained pursuant to the execution of the warrant was properly admitted at trial.

B. Suppression Was Not Required Because the Warrants Were Not Overbroad and Vague.

The Petitioners contend that the warrant was so lacking in specificity and particularity in regard to the items to be seized that it in effect constituted a general warrant and, therefore, the evidence seized thereunder should be suppressed.

Respondent maintains that because of the nature of the items authorized to be seized, the warrant is sufficiently specific and particular in its description.

The general rule stated in *Marron v. United States,* 275 U.S. 192 (1927), is that the warrant must particularly describe the place to be searched and the persons or things to be seized such that nothing is left to the discretion of the officer executing the warrant. Since the *Marron* decision, the courts have realized that there are exceptions to the broadly stated doctrine. *United States v. Maude,* 381 F.2d 1062 (D.C. Cir. 1973). An exception which *Marron* itself recognized exists where upon execution of a search warrant, a person is arrested on the premises is independently justified as incident to the arrest. *Marron v. United States, supra.* Another exception now accepted is the "plain view" doctrine which permits an officer executing a warrant to seize incriminating evidence he may inadvertently come across in the course of the search. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Just as the scope of the seizable items not specifically listed in the warrant has been broadened, so too has the degree of specificity and particularity required in the description of certain classes of items to be seized. The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances involved and types of items involved. *United States v. Davis,* 542 F.2d 743 (1976).

Hypertechnicality of the particularity requirement has yielded to the practical necessities of law enforcement. Where the precise identity of the goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice. Less particularity can be reasonably expected than for such items as stolen goods whose exact identity is already known at the time of issuance. *United States v. Johnson,* 541 F.2d 1311 (8th Cir. 1976). Thus, where the items to be seized are those

such as gambling equipment and the identity cannot be specifically ascertained, the courts have found to be sufficient in the warrant, such terms as "bookmaking paraphernalia," [*Spinelli v. United States*, 382 F.2d 871 (1967)]; "gambling paraphernalia" [*Nuckols v. United States*, 99 F.2d 353 (1938)]; and merely "paraphernalia" in the generic sense with no modifier where it is determined that both the officers and Petitioners were in actuality advised of what was meant [*United States v. Johnson*, 541 F.2d 1311 (1976)].

The language contained in the search warrant now being attacked by the Petitioners, authorizing seizure of:

> Supplies, books and records and proceeds of illegal games and gambling paraphernalia

is more than adequate to meet the specificity requirement when interpreted practically and reasonably. In fact, in light of the *Spinelli* and *Nuckols* decisions, the term "gambling paraphernalia" alone may have been sufficient. Where as here, the items are gambling equipment as in *Spinelli, supra,* and the circumstances and the nature of the items make it virtually impossible for officers to know precisely what gambling equipment and devices were present to be seized, a hypertechnical description in the warrant was not possible (*See Johnson, supra*).

In support of his argument, Petitioners cite the case of *Stanford v. Texas*, 379 U.S. 476 (1965). The warrants in that case were for seizure of literary material containing ideas and propaganda of the Communist Party. The court in *Stanford* stated that the requirement of particularity is to be reviewed more scrupulously when the "thing" to be seized is the ideas which they contain. The court further indicated that had the descriptions in the warrant been of other materials the warrants may have

met the particularity requirement. The court emphasized that their decision was limited solely to warrant's for literary material.

In the present case, the "books and records" indicated in the warrant were not literary material but accounting instruments. There is no underlying First Amendment Rights here. Therefore, *Stanford* has no applicability to the present case.

Clearly then, by evaluating the language of the warrant in the present case, in light of the existing case law the descriptions of the items to be seized were not overbroad and vague, but were of sufficient "specificity and particularity" to support the validity of the warrant. Therefore, the evidence seized thereunder was properly admitted at trial.

C. Suppression Was Not Required Because the Seizures Were General and Exploratory, Beyond the Scope of the Warrant.

The Petitioners assert that the searches conducted by the Sheriff's Department were illegal because the officers' search went beyond the scope of the warrants. The State contends that Petitioners' assertion is not supported by the record in this case.

The search warrants which the Sheriff's Department used in this case stated:

> *Inter alia*
>
> WHEREAS, there has been filed before me an Affidavit demonstrating probable cause for a search to be made of:
>
> . . . .

for certain property, namely:

Supplies, books and records and proceeds of illegal games and gambling paraphernalia,

which is evidence of the commission of a criminal offense, or fruits of that crime, to-wit:

Engaging in Organized Crime and Conducting an Illegal Bingo Game.

The issue now before the court is whether the seizure of personal items not named on the warrant should invalidate the entire search. Although this question seems to be one of the first impression in Ohio, the United States Fifth Circuit Court of Appeals has ruled that the seizure of items not within the scope of the warrant will not affect those items lawfully seized. *United States v. Mendoza,* 473 F.2d 692 (1972).

In *Brooks v. United States,* 416 F.2d 1044 (5th Cir. 1969), *cert. denied,* 400 U.S. 840 (1970), the court held that the seizure of personal items not named in the warrant (clothing and toilet articles) did not invalidate the legal seizure of articles named in the warrant.

The State courts in Washington have also held that the illegal seizure of items not used against the Petitioners at trial is not grounds for invalidating the entire search. *State of Oregon v. Roninger,* 492 P.2d 298 (1971); *State of Oregon v. Redeman,* 496 P.2d 230 (1972).

Further in *Marron v. United States, supra,* the court *sustained* the search, which included gas bills and other items held to be not within the scope of the warrant. These type of items are the same as complained of herein by the Petitioners.

The evidence introduced from the searches in this case consisted of money, books, and records of the bingo

games; nothing more then commanded by the warrants. The personal items were not introduced, but were in fact returned to the Petitioners. Accordingly there was no prejudice to the Petitioners. *United States v. Mendoza, supra.*

Petitioners' claim that the scope of the search was so far beyond the command of the warrant to invalidate it is not justified. Petitioners cite *Kremen v. United States,* 353 U.S. 346 (1957). In that case, the F.B.I. seized the entire contents of the house, including all the kitchenware, spices, and all the Petitioners' clothing. The search in *Kremen, supra,* does not compare with the search herein.

Nor can Petitioners properly rely on *Marcus v. Search Warrant,* 367 U.S. 721 (1961); *Stanford v. Texas,* 379 U.S. 476 (1965). While these cases are couched in the Fourth Amendment freedom from unreasonable searches, they seek equally to protect First Amendment Rights. *Marcus, supra,* 724, 729, and *Stanford, supra,* 484-485.

Although the Petitioners cite several cases pertaining to indiscriminate searches and seizures by police officers, none of the cited cases supports their argument that property lawfully seized according to a valid search warrant should be suppressed when personal items have also been mistakenly seized in the search. In *W.S. v. Rettig,* 589 F.2d 418 (1978), the court found that the intent of the officers was to search for items *not* listed in the warrant. Since the officers conducted a search for items not named in the warrant, the court held that the nature of the search was exploratory and that all of the items seized should be suppressed. In the case now before the court, there is no evidence that the officers intended to seize any property that was unrelated to the bingo operation. Any of the personal property taken was mistakenly seized because of the large amount of evidence that related to the bingo games.

Since the personal property was not intentionally taken, the suppression of all of the items seized would not serve any deterrent purpose. The entire rationale of the exclusionary rule is to deter police from invading an individual's right to privacy. *Mapp v. Ohio,* 367 U.S. 643 (1961).

The Respondent strongly contends that the seizure of a small amount of personal property should not invalidate the entire search. Since these items were inadvertently taken, there would be no deterrent effect in excluding evidence which was lawfully taken according to a valid search warrant.

RESPONDENT'S FOURTH REASON FOR DENYING THE WRIT

A CRIMINAL STATUTE PROVIDING ASCERTAINABLE STANDARDS OF GUILT COMPORTS WITH CONSTITUTIONAL DUE PROCESS.

Petitioners' contentions are construed as follows:

> Faith, I have been a truant in the law,
> And never yet could frame my will to it.
>
> Shakespeare, First Part of *King Henry VI.* Act ii, section 4.

Therefore, if Petitioners cannot conform their will to the statutory law, they would anticipate the law conforming to suit them.

The State submits that Petitioners' constitutional arguments are a mere cloak of convenience designed to obscure the real issues. Petitioners rely heavily on the legality of expenditures phrase in Revised Code 2915.09(A)(2):

> . . . provided that the amount of the receipts so spent is not more than is customary for a similar purchase, lease. . .

The crux of this case is not what was spent for the various statutorily listed expenditures, which are in fact set forth in a manner sufficiently clear so that "men of common intelligence need not guess at the meaning"; it is the huge sums of money diverted into Petitioners' personal coffers. *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925). Petitioners would have the Court regard the total cash seized pursuant to the authorized search warrants as money indicative of "necessaries", whether or not they are "customary or reasonable". The $159,550.08 seized during the search, which contained marked bills from the bingo games, is not even addressed by the question Petitioners have presented. To use Petitioners' own argument, is it "customary" or "reasonable" to store $128,000.00 in a red suitcase when Petitioners have full knowledge that all the gross receipts are to be used in a legitimate manner and not for personal gain? Petitioners are not being punished for violating an "unknowable something". *Screws v. United States,* 325 U.S. 91 (1945); *United States v. Gypsum,* ..... U.S. ....., 98 S. Ct. 2864, 2873 (1978); *Brown v. Concerned Citizens, Inc.*, 56 Ohio St. 2d 85 (1978).

In view of these circumstances, it is impelling that if at all possible Revised Code 2915.09 may be allowed to serve its purpose. Petitioners, however, assert the position that this statute is vague.

Petitioners rely heavily upon *Calautti v. Franklin,* 439 U.S. 379, 99 S. Ct. 675 (1979), as dispositive of the issue of void for vagueness. This case is distinguishable in various respects. The State submits one simple equation as the salient distinction, to-wit: Bingo does not equal

babies. Statutes dealing with fundamental rights as in *Calautti,* are given rigid scrutiny by the courts. As it is, the court cannot even set a standard for viability in that case:

> Visibility is a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term. *Calautti,* at 682.

The Court rejected the contention that a specific number of weeks in pregnancy must be fixed by statute as the point of visibility. *Compare,* Petitioners' arguments regarding legally fixed standards. A standard of absolute mathematical precision is neither reasonably attainable nor constitutionally mandated herein.

The intrinsic difficulties of language, and the emergence after enactment of situations not anticipated by the most gifted legislative imagination reveal doubts and ambiguities that very well compel judicial construction. The State submits that there is no canon against using common sense in construing laws as saying what they obviously mean. Justice Holmes, *Roschen v. Ward,* 279 U.S. 337, 339 (1929). The language of Revised Code 2915.09 is comprehensive language which can justify unforeseen expenses by bingo licensees, but it does not justify in any respect fleecing the lambs of the Lord's flock (i.e., the charitable organizations). The court should avoid a construction that would seriously impair effectiveness in coping with a problem which the legislative seeks to alleviate. *United States v. Harriss,* 347 U.S. 612, 617 (1954). *State ex rel. Dickman v. Deffenbacker,* 164 Ohio St. 142 (1955).

Petitioners' discussion of *United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921), is inapplicable here in view of the fact that expenses, whether customary or not, are not the issue. The standard of guilt, or the deter-

mination of scienter is not based on how much Petitioners spent on bingo cards or other purchases, per se; it is the funds that were illegally retained by Petitioners.

Only a word need be said regarding *City of Columbus v. Thompson,* 25 Ohio St. 2d 26 (1971). A suspicious person ordinance is a statute of the type to control vagrancy and are in a class by themselves, clearly distinguishable from statutes relating business type activities which are limited to a narrow category of conduct.

In conclusion, Petitioners' arguments of vagueness in regard to warning men of their conduct ignores the nature of the criminal act itself. A mind intent upon wilful evasion is inconsistent with surprised innocence. *United States v. Ragen,* 314 U.S. 513, 524 (1942).

Petitioners seek only to obscure their deeds with a cloak of constitutional protection. Such a garment becomes very transparent upon analysis, i.e., Petitioners present the case of "the Emperor's New Clothes".

CONCLUSION

Petitioners failed to state any substantiated constitutional questions. The issues presented have been well settled by this Court. Therefore, Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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